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September 14, 1999

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SEP 14 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Review of Freedom of Information Action, Control No. 99-163,
CC Dkt. No. 99-117, ASD File No. 99-22

Dear Ms. Salas,

On September 14, 1999, Robert M. Sutherland and the undersigned of BellSouth met with Linda Kinney, Legal Advisor to Commissioner Ness. (Mr. Sutherland participated via conference call.)

The purpose of the meeting was to discuss MCI's FOIA request regarding the FCC's audit of BellSouth's Continuing Property Records and to urge the Commission to grant the company's Application for Review of the staff ruling ordering the release of raw audit data. Materials used during the meeting are attached.

This notice is being filed pursuant to Sec. 1.1206(b)(2) of the Commission's rules. If you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Mary L. Henze

Mary L. Henze
Executive Director
Executive & Federal Regulatory Affairs

cc: L. Kinney

No. of Copies rec'd 0+1
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BellSouth Ex Parte Regarding
MCI Freedom of Information Act Request
FOIA Control No. 99-163

1. MCI FOIA requests information submitted by BellSouth in connection with FCC's audit of the company's Continuing Property Records.

2. The Commission is clearly not required to release the requested audit information.

3. The Commission has an unbroken, decade long policy of NOT releasing raw audit data to third parties.

4. MCI has not shown that the requested information is even relevant.

5. The staff ruling creates a horrible precedent that will impede the Commission's ability to conduct future audits.

6. BellSouth has filed an Application for Review of the staff's ruling ordering the release of raw audit data. The Commission should grant the AFR and deny MCI's FOIA request.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554 PO40899I DA 99-668
News media information 202/418-0500 Fax-On-Demand 202/418-2830 Internet: http://www.fcc.gov ftp.fcc.gov

Released: April 7, 1999

THE ACCOUNTING SAFEGUARDS DIVISION RELEASES INFORMATION CONCERNING AUDIT PROCEDURES FOR CONSIDERING REQUESTS BY THE REGIONAL BELL OPERATING COMPANIES TO RECLASSIFY OR "RESCORE" FIELD AUDIT FINDINGS OF THEIR CONTINUING PROPERTY RECORDS

On March 12, 1999, the Commission released Continuing Property Record (CPR) Audits of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Southwestern Bell and US West Telephone Companies ("CPR Audit Reports"). In an effort to provide additional information on the auditors' process for verifying the accuracy of the CPRs, the Accounting Safeguards Division of the Common Carrier Bureau is today releasing a summary of the procedures used by the auditors to review requests of the companies to rescore specific items. We note that, in releasing the audit reports, the Commission stated that it was not passing judgment on the accuracy of the reports, their findings or conclusions. We note furthermore that, concurrently with this Public Notice, the Commission will issue a Notice of Inquiry seeking comment on the procedures described below, among other issues.

Background

The CPR audits of the Regional Bell Operating Companies (companies) are based primarily on information collected in the field. During the field audits, Commission auditors, together with representatives of the companies, inspected company premises to verify the physical existence of specific items of equipment. Items were "scored" or classified in the following categories: (1) found as described; (2) found in another location; (3) not found/missing; or (4) unverifiable. In most cases, the equipment was scored in category (1) found as described. After the field audits were complete, the companies were provided an opportunity to submit additional evidence to support their claims that certain scores for items in categories (3) not found/missing or (4) unverifiable, were in error.

Verification Based on Physical Inspection

The field audits were physical inspections conducted under generally accepted government auditing standards. Under these standards, "[e]vidence obtained through the auditor's direct physical examination, observation, computation, and inspection is more competent than evidence obtained indirectly." Thus, consistent with this standard, the best evidence that verified whether

an item was accurately recorded in the CPRs was the auditors' physical inspection during the field audits.

Re-Scoring Based on Additional Evidence

After the field audits were complete, the auditors provided companies an opportunity to request re-scoring of an item if the company believed the initial scoring by the auditors may have been in error. The basic standard that companies were required to meet in order to have an item re-scored was to provide adequate and convincing evidence that the facts were different than appeared at the time of the auditors' on-site inspection. In order to warrant a change in scoring, this additional evidence had to have strong probative value equal to the physical inspection evidence. Carriers were advised to provide adequate and convincing documentation that would make clear that the actual condition was different from what appeared to the auditor at the time of the physical inspection. In response, the carriers provided a range of documentation requesting scoring changes.

In preparing the final Audit Reports, the auditors fully considered all requests by carriers for re-scoring an item. The auditors consistently applied their standard for changing an initial score in each review of every item subject to a re-scoring request. The type and quality of evidence submitted by the companies was not consistent, however, and often did not meet the standards to warrant re-scoring. Carriers primarily submitted additional evidence attempting to show CPR recording errors (*i.e.*, quantity errors), removal of equipment prior to the physical inspection (*i.e.*, interim removals or retirements), and "embedded items" (items hidden or encased in other items). Adequate and convincing evidence that the auditors found probative of these claims consisted mainly of source documentation and engineering drawings.

a) Source Documentation: As a general rule, entries to the accounts and to the CPR should be supported by accounting records, known as source documents, that provide the basis for recording the accounting transactions: *e.g.*, documents for plant assets are purchase orders, invoices, time sheets and work orders. The auditors found such documents containing cost amounts, signatures, dates, and other such evidence to be the most convincing of the facts relative to the installation and removal of equipment. Internally generated computer lists, on the other hand, were not considered adequate without additional support. The auditors found two common situations, described below, in which source documentation constituted probative evidence sufficient to warrant a change in the original scoring.

Quantity Recording Errors. In the first situation, the companies provided source documentation to demonstrate that the quantity of items stated in the CPRs was incorrect and that items, considered to be missing, were not missing. For example, the CPR may have listed 6 units of equipment in service while the auditors' physical inspection found only 4 units of equipment in service. If the company provided original invoices showing that only 4 units had been installed and the equipment descriptions, dates of purchase, and costs stated on the invoices matched the information on the CPR, the auditors determined that the evidence was probative of a quantity error and that a re-scoring of the initial designation of "not found" was warranted. The

auditors examined the invoices to be sure they represented the items in question. For instance, for each item, they looked to see if the information on the invoices (such as vintage and office location) corresponded with the information listed on the CPR. The auditors considered the quantity listed on the invoice with the quantity recorded in the CPR, and compared the material cost billed with the material cost recorded in the CPR. When the evidence showed that the recorded cost was the same, but the quantity appeared to be overstated, the auditors found the evidence was probative that an error had likely been made in the quantity listed on the CPR and re-scored the items accordingly in the companies' favor.

The auditors did not find source documentation sufficient where the information on the invoices did not match the descriptions and/or the costs of the equipment listed in the CPRs. In these cases, the initial scoring derived from the physical inspections was not changed. In cases where the companies provided non-source documentation, *e.g*, internal documents that were not contemporaneous with the equipment purchase or installation, the auditors generally found the evidence was inadequate and not sufficient to warrant a re-scoring. In both of these cases, the auditors determined that the companies' additional evidence was not adequate and convincing proof of a quantity error on the CPR related to the particular items under review.

Where a carrier provided some indication that the CPR contained errors concerning the number of items on a CPR record, but presented no adequate or convincing source documentation, the auditors used cost information in the CPR to determine whether quantity errors existed in the CPR. For each item where the quantity stated on the CPR was questionable, the auditors determined. as accurately as possible, the cost of that item (on a per unit basis) and evaluated whether the cost stated on the CPR (on a per unit basis) was accurate. To determine the per unit cost of the item in question, the auditors calculated the average cost of the same model of equipment (*i.e.*, equipment type, manufacturer, and vintage) for all such items listed on the CPR. If the cost recorded on the CPR for that item (on a per unit basis) was substantially higher than the average cost of that item, it appeared that the quantity on the CPR may have been incorrect. Thus, in cases where the recorded cost fully appeared to support a lesser quantity than recorded, the auditors generally re-scored the "not found" designation.

Interim Retirements. Source documentation also led to changes in scoring where there was adequate and convincing evidence of recent retirements. In some cases, the companies claimed that the items of equipment were retired between the date the CPR listing was printed and the date of the on-site inspection. In the cases where the company demonstrated, through source documents, that the items had, in fact, been retired during the interim period, theinitial "not found" designations were re-scored in the companies' favor. Generally, claims of equipment retirement during the interim period between the CPR printout and the audit field work were found to be an adequate basis for re-scoring when the document flow demonstrated the usual procedures for retirement. For this purpose, the auditors found probative evidence existed where carriers provided a telephone equipment order ("TEO") and a confirmation of removal by technicians. Generally, this documentation reflected dates of removal authorization (usually, around the time of the audit) and authorizing signatures.

Carrier-provided documentation for interim retirements was not always adequate to warrant re-scoring. In some cases, the carrier provided an invoice for an item categorized as "not found." Generally, such invoices demonstrate only that the item had been purchased, and is not proof that an interim removal or retirement had occurred. In some cases, carriers provided documentation that showed a removal had taken place long before the audit work, such that the item should not have been listed on the CPR. The auditors found this documentation supported a conclusion that the item was not found to be in service. In some cases, the carriers provided a document that indicated that a retirement or removal had occurred, however, no further documentation or evidence was provided that reflected dates of removal or authorizing signatures (*i.e.*, the TEO). In these cases, the auditors found that documents that simply showed that a retirement was made at or around the time of the audit, without more probative evidence, such as a TEO, were not probative evidence sufficient to support a claim of interim retirement or removal. Rather, this type of documentation indicated possible discrepancies in the companies' retirement practices. In these cases, without proof that an interim retirement or removal had occurred, the auditors found no changes in scoring were warranted.

In all cases where a request to re-score an item was made based on a claim that the item had been retired or removed between the time the CPR list for audit was printed and the auditor's on-site physical inspection, the auditors required evidence demonstrating that the item had been removed in the interim. When the evidence was adequate and convincing, the auditors made a change; when it was not, the auditors did not make a change.

b) Engineering Drawings: There were instances during the field audit where the company claimed a particular item could not be seen because it was inside another item (embedded items). If the company representative provided evidence (*e.g.*, an engineering drawing or a manufacturer schematic) demonstrating that this was true, the auditor classified the item as "found." If no such evidence was provided during the field audit, but a credible claim was made that the equipment was embedded in other equipment present, the item was scored as "unverified." (Generally, a claim was considered credible if the other equipment listed for the same frame was found to be in place as listed.) After the field audit, companies submitted evidence that items scored as "unverified" were embedded, and by design, functioned within other equipment. If the companies provided documentation (*e.g.*, an engineering drawing or manufacturer schematic) that showed that an item initially scored as "unverified," functioned by design within another item listed on the frame, the item was re-scored as "found." If the evidence was not conclusive, or if no evidence was provided, the item remained scored as "unverified." In no case where a credible claim was made that an item was embedded was the item scored as "not found" or included in the evaluation of the cost of "not found" items.

For further information, please contact Andrew Mulitz, at (202) 418-0827 (voice), (202) 418-0484 (TTY).

Action by the Chief, Accounting Safeguards Division, Common Carrier Bureau, FCC.

BELLSOUTH

BellSouth Corporation
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M. Robert Sutherland
General Attorney

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Fax 404 249-2385

July 12, 1999

PLEASE DATE-STAMP AND RETURN

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JUL 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
445 12th Street, S.W., Room 1-C144
Washington, D.C. 20554

Re: MCI WorldCom Freedom of Information Act Request
CC Docket No. 99-117, ASD File No. 99-22

Dear Mr. Fishel:

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby oppose the Freedom of Information Act ("FOIA") Request ("Request") filed by MCI WorldCom, Inc. ("MCI") on June 22, 1999, seeking public access to documents submitted to the Commission by BellSouth in connection with a Commission audit of BellSouth's Continuing Property Records ("CPR"). BellSouth also opposes MCI's request for access to certain work papers authored or compiled by the Accounting Safeguards Division ("ASD"), but requests in the alternative that if MCI is granted access to these documents, BellSouth be granted equal access.

MCI requests public disclosure of "any materials that the RBOCs have submitted to the [ASD] to explain why hard-wired COE equipment items were not found by the auditors or to support claims that items in the audit sample should be 'rescored'." Request at 1. MCI also requests public disclosure of "audit work papers generated by ASD staff during the course of the audits that show or support the item-by-item scoring of the items in the audit sample." Finally, MCI requests that the Commission "disclose the CPR detail (vintage, description, etc.) for any items scored 'partially found,' 'not found,' or 'not verifiable' at any time during the audit process." Request at 2.

BellSouth demonstrates below that MCI's Request must be denied. The Managing Director is under no legal compulsion to make public the audit information requested by MCI. MCI is requesting that the Managing Director take the unprecedented action of releasing raw audit information that is clearly exempt from disclosure under the FOIA and the Commission's Rules without the slightest justification for changing the Commission's longstanding policy of protecting audit information from public disclosure. MCI's so-called "public interest" showing is spurious. The information sought is not even relevant to any issue in the captioned

proceeding. Therefore, MCI's Request should be denied by the Managing Director out of hand. By submitting this opposition at this time, BellSouth does not waive its rights under Section 0.461(i) of the Rules.

I. The Commission is not legally obligated to release the requested information.

The Freedom of Information Act, 5 U.S.C.A. § 552, generally requires release of information in the possession of federal agencies upon request to a member of the public. There are certain express exceptions to the disclosure requirement, three of which are controlling here. Section 552(b) provides, in pertinent part:

> (b) This section does not apply to matters that are—
>
> . . .
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this Title), provided that such statute . . . refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . .

Section 220(f) of the Communications Act prohibits disclosure by any Commissioner, officer or employee of the Commission of "any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinafter provided, except insofar as he may be directed by the Commission or a Court." This is specific statutory authority sufficient to exempt audit information from disclosure under Section 552(b)(3).

The Commission's regulations implementing the FOIA are contained in 47 C.F.R. § 0.441 et seq. 47 C.F.R. § 0.457 is entitled "Records not routinely available for public inspection." Included are rules implementing FOIA Exemptions 3, 4, and 5. Specifically, Section 0.457(d) implements Exemptions 3 and 4. Section 0.457(e) implements Exemption 5. As shown below, the BellSouth documents requested by MCI are exempt from disclosure under Section 0.457(d). The ASD work papers are exempt from disclosure under Section 0.457(e).

A. Exemption 3 and Section 0.457(d)(1)(iii) authorize rejection of the Request.

The Commission's Rules are unequivocal. Under Section 0.457(d)(1)(iii), "Information submitted in connection with audits, investigations, and examination of records pursuant to 47 U.S.C. § 220" are "not routinely available for public inspection." "A persuasive showing as to the reasons for inspection will be required in requests for inspection of such materials submitted under §0.461." 47 C.F.R. § 0.457(d)(1). As discussed below, MCI's Request falls woefully short of this standard. Therefore, the Managing Director is legally authorized to reject MCI's Request out of hand.

B. Exemption 4 and Section 0.457(d)(2) also authorize non-disclosure.

BellSouth's documents are also exempt from disclosure under Exemption 4 and Section 0.457(d)(2) of the Rules. Because the requested documents were submitted in connection with an audit, and are listed in Section 0.457(d)(1)(iii), BellSouth was not required to file a request for non-disclosure under Section 0.459 of the Rules. Nevertheless, as demonstrated below, the documents in question also qualify for non-disclosure under Section 0.457(d)(2) because "commercial, financial or technical data which would customarily be guarded from competitors . . . will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461." BellSouth's documents clearly meet the standard for non-disclosure and MCI's Request falls far short of meeting the "persuasive showing" needed to justify disclosure of such documents.

C. Exemption 5 and Section 0.457(e) protect the ASD work papers from disclosure.

The Managing Director is expressly authorized to reject MCI's Request for access to the ASD staff's work papers pursuant to Exemption 5 and Section 0.457(e), which provides that:

> ...the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance with the procedures set forth in § 0.461. Only if it is shown in a request under §0.461 that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission will the communication be made available for public inspection. Normally, such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

MCI has made no attempt whatsoever to demonstrate that disclosure of the staff's work papers is authorized under this standard. Therefore, this portion of MCI's Request must be rejected by the Managing Director. However, if the Managing Director releases the staff's work papers to MCI, BellSouth requests that it be provided with equal access to these documents. BellSouth is the party that was audited by the staff, and BellSouth is the party that is potentially subject to an enforcement proceeding as a result of the audit. Therefore, BellSouth has a superior interest to that of MCI in having access to the staff's work papers if they are released in the captioned proceeding. BellSouth also reserves its right to seek access to the staff auditors and their work papers should an enforcement proceeding be commenced by the Commission.

BellSouth has demonstrated above that the Managing Director is authorized to reject MCI's Request at this stage of the proceeding as a matter of law. The Commission is clearly authorized to withhold the records requested by MCI from public inspection. In such circumstances, under Section 0.461(f)(4) of the Rules, "the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented." A

"persuasive showing as to the reasons for inspection will be required...." by the proponent of disclosure. 47 C.F.R. § 0.457(d)(1) and (d)(2). MCI has made no such showing.

II. MCI has utterly failed to justify release of the requested documents.

MCI bears the burden of demonstrating that disclosure of the requested documents will serve the public interest. It has utterly failed to make such a showing. MCI begins by asserting BellSouth's services "are not subject to significant competition." Request at 3. MCI's bald assertion is patently ridiculous. BellSouth's intraLATA toll service revenues have declined more than 40% over the last five years, from $1.2 billion in 1994 to $713 million in 1998. Most of that decline is due to competition from interexchange carriers like MCI and AT&T. Competitive Local Exchange Carriers ("CLECs") now provide over a million access lines in the BellSouth region. BellSouth faces intense competition from numerous CLECs operating on both a facilities and resale basis.

MCI next argues that release of the requested information would not cause BellSouth "substantial competitive harm." Request at 3. "Substantial competitive harm", however, is not the standard stated in the Rules. Rather, the standard is whether the information is of a type "which would customarily be guarded from competitors." 47 C.F.R. § 0.457(d)(2). The raw audit data requested by MCI clearly meets this standard. BellSouth does not disclose its CPR to competitors.

In any event, the detailed information requested by MCI is competitively sensitive. The requested documents contain detailed information that would disclose negotiated prices paid for specific types of equipment from various vendors. Disclosure of such information would give competitors insight into BellSouth's ability to negotiate prices for equipment with vendors, and could impair future negotiations. Location specific detail of central office investment could also allow MCI and other competitors to target specific locations for competitive entry based on the age and capabilities of BellSouth's equipment.

MCI also fails to show how release of the requested information would serve the public interest. MCI claims that it needs access to detailed "scoring" information in order to comment on Issue 2 in the pending Notice of Inquiry ("NOI"). However, Issue 2 relates to "the validity and reasonableness of the methodology used by the Bureau's auditors in determining whether to rescore or modify a finding..." NOI at ¶ 6. The Commission did not ask for comments on the accuracy of the scoring performed by the auditors. As MCI concedes, the Bureau released a Public Notice on April 7, 1999 describing the methodology and procedures employed to respond to claims by BellSouth and other audited carriers that its scoring was incorrect. Request at 2. That is all that MCI needs to address the issue presented in the NOI. The detailed information requested by MCI is simply irrelevant.

The details of the scoring of individual items might be relevant in an enforcement proceeding. The purpose of the NOI, however, is to determine whether or not to initiate an enforcement proceeding. If no enforcement proceeding is initiated, there will be no need to litigate the accuracy of the scoring by the auditors. MCI's request is at best premature. It falls

far short of the compelling public interest showing required to overcome the Commission's longstanding policy of keeping audit information confidential.

III. The Commission should follow its policy of keeping audit data confidential.

Less than a year ago, the Commission conducted a comprehensive review of its policy concerning treatment of confidential information submitted to the Commission. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket 96-55, **Report and Order**, 13 FCC Rcd 24816, released August 4, 1998. In that proceeding, the Commission discussed what would constitute a "persuasive showing" justifying the release confidential information in the possession of the Commission. The Commission stated:

> [T]he Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding, or where the Commission has identified a compelling public interest in disclosure. **Report and Order** at ¶ 8, 13 FCC Rcd at 24822.

The Commission reiterated that the "requester of such information should continue to bear the burden of making a persuasive showing as to the reasons for inspection when access to confidential information is sought."" **Report and Order** at ¶ 19, 13 FCC Rcd at 24831. With regard to audit information, the Commission reiterated its "longstanding policy of treating information obtained from carriers during audits as confidential." **Report and Order** at ¶ 54, 13 FCC Rcd 24848. The Commission stated:

> Carriers have a legitimate interest in protecting confidential information, and we agree that disclosure could result in competitive injury to those who provide such information to the Commission. This policy is also designed to enhance the efficiency and integrity of our audit process by encouraging carriers to comply in good faith with Commission requests for information. Moreover, the Commission considers audit reports to be internal agency documents that, consistent with FOIA Exemption 5, generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations. Since we are able to make a finding that audit materials received from carriers generally fall within FOIA Exemption 4, and as an indication of the importance we place on upholding the confidentiality of these materials, we will amend Section 0.457 of our rules to indicate that information submitted in connection with audits, investigations and examination of records will not routinely be made available for public inspection. **Report and Order** at ¶ 54, 13 FCC Rcd at 24848.

In this case, the Commission has already weighed the factors for and against disclosure and has determined that the proper balance was to release the staff's audit report and the carriers' responses thereto. MCI's request, however, seeks to have the Managing Director take the unprecedented step of releasing raw audit documents and staff work papers. The Managing

Director should consider taking such a step only in the most compelling of circumstances. MCI's showing does not come close to meeting that standard.

MCI's Request does not even address the Commission's concern about the impact of disclosure on the efficiency and integrity of the audit process. As the Commission has repeatedly noted, the audit process relies upon and receives the full cooperation of the audited companies. As stated in Paragraph 51 of the Notice leading to the **Report and Order:**

> The Commission has held that the public disclosure of data gathered in an audit is likely to impair its future ability to obtain such data because while the Commission could rely on compulsory process to obtain the desired materials, such measures would involve significant expense and delay. The Commission has also recognized in this regard that although the information gathering process that takes place during an audit begins with a general inquiry that presents an opportunity for a very selective response by the carrier, carriers have been very cooperative, not only permitting examination of company records, but also allowing employee interviews and preparing new documents. The Commission has also recognized that if audit materials were routinely disclosed, it would be likely that voluntary assistance in providing information would diminish, especially since the audits do not present the expectation of a government-bestowed benefit on the carrier. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, CC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 96-109, released March 25, 1996 at ¶ 51.

The Commission's policy in this regard goes back more than a decade. *See, e.g., Scott J. Rafferty*, 5 FCC Rcd 4138, ¶ 5 (1990), emphasizing the Commission's settled policy of not disclosing raw audit data. It should not be overturned by the Managing Director in this case. The present audit is a perfect example. BellSouth believes that it is no overstatement to say that the ASD audit staff could not have performed the CPR audit without extensive cooperation and assistance from BellSouth. In providing that cooperation and assistance, BellSouth operated with the full expectation, based on long history as well as the recent **Report and Order**, that the documents provided to the Commission would not be made public. If that expectation is destroyed in this proceeding, BellSouth will be forced to view future audits as possible precursors to litigation. In the absence of an expectation of confidentiality, the appropriate litigation strategy would be to respond very literally to an auditor's inquiry.

IV. The Commission should not release audit data pursuant to a protective order.

As an alternative to public release of BellSouth's documents, MCI requests that the Commission could issue a protective order limiting access to and use of the information. Request at 4. The Commission should deny this request. First, use of a protective order should not be considered unless and until the Commission determines that it is appropriate to release raw audit data. As shown above, the Commission should not do so in this case. Second, release of raw audit data subject to a protective order does not address the damage that would be done to the audit process if carriers cannot be confident that the data they submit to the Commission during an audit will be kept confidential and not disclosed to a competitor, even pursuant to a

protective order. Third, MCI does not explain how it could use the data in this proceeding without violating the protective order. The Commission would have to establish separate filings for public and private versions of comments in this proceeding. The Commission has generally refused to take such steps in rulemaking or Notice of Inquiry proceedings. *See, e.g.*, **Report and Order**, ¶ 44.

V. Conclusion.

The Managing Director has clear legal authority to deny MCI's Request. MCI has not demonstrated that the public interest would be served by granting its request. The Managing Director should not abandon years of consistent Commission policy by ordering the release of raw audit information and staff work papers. If the Managing Director abandons precedent and undercuts settled expectations, the Commission's future audit capability could be severely damaged.

A copy of this opposition is being served on Mary L. Brown, Senior Policy Counsel, at MCI.

Sincerely,

Robert Sutherland /DF

M. Robert Sutherland

cc: Chris Wright
Lisa Zania
Ken Moran
Andy Mulitz
Cliff Rand

COPY

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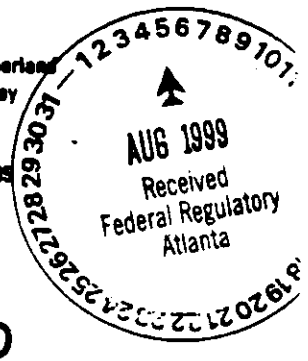

August 3, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Christopher J. Wright
General Counsel
Federal Communications Commission
445 12th Street, SW – The Portals
Washington, D.C. 20554

Re: Review of Freedom of Information Action
Control No. 99-163; CC Docket No. 99-117

Dear Mr. Wright:

BellSouth Corporation ("BellSouth") hereby seeks full Commission review of the July 27, 1999 Letter Ruling ("Letter Ruling") of the Common Carrier Bureau ("Bureau") granting a Freedom of Information Act ("FOIA") Request ("Request") by MCI Telecommunications Corporation ("MCI") for access to raw audit data submitted by BellSouth in connection with the Commission's Continuing Property Records ("CPR") audit. The letter ruling also grants MCI access to workpapers prepared by the Commission's audit staff. This request for review is submitted pursuant to Section 0.461(i) of the Commission's Rules.[1] As shown below, the Letter Ruling violates an unbroken string of Commission precedents. It also is contrary to recent rulemaking action codifying the audit exception to the FOIA. It fails to apply the standards set forth in the Commission's rules. And as this Commission and the courts have recognized in

[1] The letter ruling purports to deny BellSouth's "requests for confidentiality, pursuant to Section 0.459(g) of the Commission's rules." Letter Ruling at 5. BellSouth did not submit a request for confidentiality under Section 0.459 of the Rules. As BellSouth explained in its July 12, 1999 opposition to MCI's FOIA request, the audit data submitted by BellSouth is exempt from mandatory disclosure pursuant to Section 0.457(d) of the Rules. Therefore, BellSouth was not required to justify non-disclosure under Section 0.459 of the Rules. The Letter Ruling therefore denied a request that BellSouth did not make. The staff informed BellSouth that because the Letter Ruling was grounded in Section 0.459(g) of the Rules, BellSouth's Application for Review was due five business days after the ruling. BellSouth strongly disagrees with this interpretation of the Rules. BellSouth's right to review is grounded in Section 0.461(i) of the rules, which provides ten business days to seek review of a staff order granting a FOIA request. Out of an abundance of caution, BellSouth is filing this Application for Review within five business days after the Letter Ruling.

prior rulings, it will severely damage the Commission's ability to conduct future audits. It does all these things in the factual context of an information request that is not even relevant to the underlying proceeding in which the information will purportedly be used. The Commission should overrule the unfortunate policy choices made by the Bureau and deny MCI's FOIA request.

I. Introduction.

During 1997 and 1998, the Accounting Safeguards Division ("ASD") of the Common Carrier Bureau conducted an audit of BellSouth's CPR. The ASD invited BellSouth to request rescoring of any items where BellSouth disagreed with the staff's scoring. BellSouth responded with a binder of backup materials supporting its request for rescoring. In December, 1998, the ASD provided BellSouth with a draft audit report and invited BellSouth to respond. On March 12, 1999 the Commission issued an order releasing the ASD's audit report and BellSouth's response to the public. ASD File No. 99-22. On April 7, 1999 the Commission released a Notice of Inquiry ("NOI"), CC Docket No. 99-117, which invited public comment on the audit report and BellSouth's response thereto. The NOI, among other things, sought comment on Issue No. 2: "[T]he validity and reasonableness of the methodology used by the Bureau's auditors in determining whether to rescore or to modify a finding during the field audit that equipment was 'not found'." At the same time, the Bureau released a Public Notice, DA 99-668, that described in detail the methodology used by the Bureau in deciding whether or not to rescore items that were "not found" during the field visit.

On June 22, 1999, MCI filed a FOIA request. MCI requested access to "any materials that the RBOCs have submitted to the [ASD] to explain why hard-wired COE equipment items were not found by the auditors or to support claims that items in the audit sample should be 'rescored'." Request at 1. MCI also requested public disclosure of "audit work papers generated by ASD staff during the course of the audits that show or support the item-by-item scoring of the items in the audit sample." Finally, MCI requested that the Commission "disclose the CPR detail (vintage, description, etc.) for any items scored 'partially found,' 'not found,' or 'not verifiable' at any time during the audit process." Request at 2. On July 12, 1999, BellSouth filed an opposition to MCI's FOIA request. On July 27, 1999 the Bureau issued its Letter Ruling granting MCI access to the raw audit data submitted by BellSouth and to the Staff's workpapers dealing with the rescoring request, subject to a protective order.

II. The Letter Ruling.

The Letter Ruling asserts that the release of audit materials "satisfies the compelling interest of providing parties access to the information in issue so that they have a reasonable opportunity to comment on NOI Issue No. 2." Letter Ruling at 2. It alleges that "the specific question raised in our NOI concerning the ASD auditors' rescoring process can only be answered by allowing parties interested in filing comments to review this material." Id. It claims that since the release is discretionary, "it does not serve as precedent for future requests under FOIA or otherwise." Letter Ruling at 3. It

claims that allowing release through a protective order can ameliorate any potential competitive harm to BellSouth. Letter Ruling at 2.

III. The information sought by MCI is not needed to respond to Issue No. 2.

The only reason given by the Bureau in the Letter Ruling for releasing the raw audit information requested by MCI is the repeated assertion that Issue No. 2 "can only be answered by allowing parties interested in filing comments to review this material." Letter Ruling at 2-3. However, neither MCI nor the Bureau attempts to demonstrate that this assertion is true.

Issue No. 2 sought comment on: "The validity and reasonableness of the methodology used by the Bureau's auditors . . . ." NOI at 3. Thus, the only issue as to which comment was sought related to the methodology used by the Bureau, not the accuracy of the individual scoring decisions made by the auditors. To facilitate public comment on Issue No. 2, on the same day the NOI was released the Bureau released a Public Notice, "The Accounting Safeguards Division Releases Information Concerning Audit Procedures for Considering Requests by the Regional Bell Operating Companies to Reclassify or "Rescore" Field Audit Findings of Their Continuing Property Records", DA 99-668 (rel. April 7, 1999). That document set forth in detail the methodology employed and the factors considered by the Bureau in evaluating requests for rescoring. The Public Notice is more than sufficient to allow interest parties to comment on the validity and reasonableness of the methodology used by the staff in deciding whether to reclassify individual items.

In its FOIA request, MCI's entire justification for seeking access to the raw audit data requested is contained in a single sentence: "In order to address the issue of whether the rescoring methodology used by the Bureau auditors was valid and reasonable, interested parties must be able to examine, on an item-by-item basis, the auditors' scoring decisions and the material the RBOCs submitted in support of their requests to 'rescore' an item." Request at 2. MCI makes no attempt to demonstrate the truth of this assertion. Why is it necessary to evaluate hundreds of individual scoring decisions in order to comment on the validity of the methodology employed by the auditors? Neither MCI nor the Letter Ruling says. Why is the Commission attempting to rely on a third party to determine if the staff auditors made correct judgmental audit decisions, especially when that third party is a competitor that stands to benefit if any enforcement action is taken against BellSouth?

The Letter Ruling orders the release of significantly more information than is necessary to address the scoring decisions referenced in Issue 2, and significantly more information than MCI requested. Issue 2 of the NOI asks for comment on the methodology used to classify items as "not found". In BellSouth's case, that is 116 items. MCI expanded the request to ask for the data pertaining to items scored "partially found","not found" or "not verifiable". Request at 2. This expanded the universe to 215 items in BellSouth's case. MCI specifically acknowledged that it was requesting CPR detail for "at most, approximately 300 items for each RBOC." Request at 3. The Bureau,

however, ordered the release of CPR detail "of all sampled items and all undetailed investment." Protective Order, para. 1(c)(i). This amounts to 1152 items for each Bell company. Thus, the Letter Ruling thus orders the release of more than five times the information requested by MCI and more than ten times the information that was identified in Issue 2.

This is a NOI, not an enforcement proceeding. If, at the end of this proceeding, the Commission determines that no enforcement proceedings are justified, the validity of the individual scoring decisions will never become relevant. If enforcement proceedings are initiated, then and only then will individual scoring decisions become relevant. It is entirely inappropriate for the Commission to depart from an unbroken string of precedents regarding the confidentiality of raw audit data by granting MCI's request in this proceeding.

IV. Release of raw audit data in unprecedented.

In an unbroken string of decisions going back a decade, the Commission has consistently refused to release raw audit data in response to FOIA requests.[2] The Commission recognized three reasons why audit material should not be released: 1) Audit material is exempt from disclosure under the FOIA, so the Commission is under no legal obligation to release audit information; 2) carriers have an expectation of privacy in audit materials, and release of audit information would breach that expectation of privacy; and 3) if the expectation of privacy is breached, the Commission's ability to conduct future audits efficiently will be impaired. In the rare case when the Commission has found that the public interest requires the release of audit information, the Commission has limited the information released to only summary information or the audit report itself.

Less than a year ago, the Commission conducted a comprehensive review of its policy concerning treatment of confidential information submitted to the Commission. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GC Docket 96-55, **Report and Order**, FCC 98-184, released August 4, 1998. In that proceeding, the Commission discussed what would constitute a "persuasive showing" justifying the release of confidential information in the possession of the Commission. The Commission stated:

> [T]he Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party has placed its financial condition at issue in a Commission proceeding, or where the Commission

[2] *See, e.g., Scott J. Rafferty*, 5 FCC Rcd 4138 (1990); *Martha H. Platt*, 5 FCC Rcd 5742 (1990); *David J. Stoner*, 5 FCC Rcd 6458 (1990); *National Exchange Carrier Association*, 5 FCC Rcd 7'48 (1990); *GTE Telephone Operating Companies*, 9 FCC Rcd 2588 (1994); *The Bell Telephone Operating Companies*, 10 FCC Rcd 11541 (1995).

has identified a compelling public interest in disclosure. **Report and Order** at ¶ 8.

The Commission reiterated that the "requester of such information should continue to bear the burden of making a persuasive showing as to the reasons for inspection when access to confidential information is sought."" **Report and Order** at ¶ 19. With regard to audit information, the Commission reiterated its "longstanding policy of treating information obtained from carriers during audits as confidential." **Report and Order** at ¶ 54. The Commission stated:

> Carriers have a legitimate interest in protecting confidential information, and we agree that disclosure could result in competitive injury to those who provide such information to the Commission. This policy is also designed to enhance the efficiency and integrity of our audit process by encouraging carriers to comply in good faith with Commission requests for information. Moreover, the Commission considers audit reports to be internal agency documents that, consistent with FOIA Exemption 5, generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations. Since we are able to make a finding that audit materials received from carriers generally fall within FOIA Exemption 4, and as an indication of the importance we place on upholding the confidentiality of these materials, we will amend Section 0.457 of our rules to indicate that information submitted in connection with audits, investigations and examinations of records will not routinely be made available for public inspection. **Report and Order at ¶ 54.**

In this case, the Commission has already weighed the factors for and against disclosure and has determined that the proper balance was to release the staff's audit report and the carriers' responses thereto. The Letter Ruling ignored that choice by the Commission. The Letter Ruling also violates the Commission's Rules by failing to require MCI to make a "persuasive showing as to the reasons for inspection...." 47 C.R.F. Sec. 0.457(d)(2). As shown above, MCI has not even shown how the requested material is relevant to its comments on the NOI.

V. Release of raw audit data is not required by law.

The Letter Ruling concludes that the Commission is under no legal obligation to grant MCI's FOIA request. In this regard, the Bureau is clearly correct. The Freedom of Information Act, 5 U.S.C.A. § 552, generally requires release of information in the possession of federal agencies upon request to a member of the public. There are certain express exceptions to the disclosure requirement, three of which are controlling here. Section 552(b) provides, in pertinent part:

> (b) This section does not apply to matters that are—
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> . . .

(3) specifically exempted from disclosure by statute (other than section 552b of this Title), provided that such statute . . . refers to particular types of matters to be withheld;

(4) trade secrets and confidential or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law other than an agency in litigation with the agency; . . .

Section 220(f) of the Communications Act prohibits disclosure by any Commissioner, officer or employee of the Commission of "any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinafter provided, except insofar as he may be directed by the Commission or a Court." This is specific statutory authority sufficient to exempt audit information from disclosure under Section 552(b)(3).

VI. Release or raw audit data is a poor policy choice.

Having concluded that release of the information requested by MCI is purely discretionary, the Letter Ruling then makes the following incredible statement: "Because the release of this information is discretionary, it does not serve as precedent for future requests under FOIA or otherwise." Letter Ruling at 3. The most charitable thing that can be said about this statement is that it is incredibly naïve. The Letter Ruling orders the release of raw audit information on the unsupported claim by MCI that the information requested is necessary to prepare its comments on Issue No. 2. As shown above, the information requested is not even relevant to the question posed by the Commission in Issue No. 2. Furthermore, the Bureau did not follow the Commission's rules and require MCI to make a "persuasive showing" as to its need for the requested information.

The Letter Ruling also makes it clear that the Bureau made no attempt to weigh the harm to the carrier caused by the release of the requested information against the potential benefit that would accrue from giving MCI additional information to assist in preparing its comments on the NOI. Indeed, the Letter Ruling concedes that the Bureau did not even examine the documents in question prior to ordering their release.[3] In essence, what the Letter Ruling does is make discretionary release of audit information standardless. This is the worst possible precedent imaginable. In future audits, BellSouth and all other carriers will have to presume that its confidential information is subject to release to its competitors merely for the asking.

As the Commission has clearly recognized:

In the context of Commission audits, ... disclosure of ...raw data would likely impair our information-gathering abilities.... [T]he audit process

[3] Letter Ruling at 3: "Due to the volume and nature of the audit material in issue, without a line-by-line analysis, we cannot presumptively conclude that none of the requested materials fall under the ambit of Exemption 4."

> depends largely on the cooperation of carriers who generally have been willing, upon Commission request, to permit examination of existing documents, create new documents and allow employee interviews in the belief that such information will not be disclosed.... [T]he cooperation of carriers is essential to an efficient and productive audit. If raw data submitted by carriers is disclosed, it is likely that such voluntary assistance will diminish, especially since the audit process does not present the expectation of a government-bestowed benefit."[4]

The present audit is a perfect example. BellSouth believes that it is no overstatement to say that the ASD audit staff could not have performed the CPR audit without the extensive cooperation and assistance of BellSouth. In providing that cooperation and assistance, BellSouth operated with the full expectation, based on long history as well as the recent **Report and Order**, that the documents provided to the Commission would not be made public. If that expectation is destroyed in this proceeding, BellSouth will be forced to view future audits as possible precursors to litigation. In the absence of an expectation of confidentiality, the appropriate litigation strategy would be to respond very literally to an auditor's inquiry, to decline to create new documents at the request of the auditors, and to deny access to subject matter experts to assist the auditors. The Commission should carefully consider the full implications of the change in policy created by the Letter Ruling.

VII. A protective order is not sufficient to protect BellSouth and its vendors.

The Letter Ruling asserts that because the raw audit information will be released subject to a protective order, such disclosure "ameliorates any alleged threat of competitive injury to any RBOC...." Letter Ruling at 4. As shown above, threat of competitive injury is only one factor in the Commission's analysis. Indeed, the threat of disclosure of raw audit information to a competitor will change the way carriers approach future audits, with or without a protective order. In any event, the Bureau is wrong if it thinks a protective order will adequately protect BellSouth. The information being sought by MCI includes not only confidential and proprietary information of BellSouth, but also confidential and proprietary information of BellSouth's suppliers and vendors. Almost without exception BellSouth's contracts with vendors and suppliers includes obligations to keep such information confidential and in most cases cannot be released without the vendor or supplier's written consent.[5] Accordingly, the staff's decision to release the information requested by MCI would place an administrative burden on

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[4] *Scott J. Rafferty*, 5 FCC Rcd 4138, para. 5 (1990).

[5] The contracts cover various vendors over several time periods, thus it would be inefficient for BellSouth to attempt to provide the contractual language from each of the potentially affected vendor agreements. Most of the agreements, however, contain a "Survival of Obligations" clause that requires the parties to comply with certain obligations, such as confidentially, after the term of the agreement has expired. Thus, BellSouth continues to be contractually obligated to keep such information from disclosure even though the contact may no longer be effective.

BellSouth to notify each vendor and attempt to obtain a written release.[6] Moreover, even if the vendors provided such a release, they would do so reluctantly. Having no guarantee of confidentially will no doubt have a chilling effect on future contract negotiations between BellSouth and its vendors and will reduce the necessary flow of information from vendors to BellSouth that BellSouth needs to operate its business.

VIII. Conclusion.

The Letter Ruling creates a devastating precedent that will fundamentally alter future audits. Carriers have relied on the Commission's unbroken precedent of refusing to release raw audit information in response to FOIA requests. The Commission only last year reiterated its intention to refuse to release any audit information (much less than raw documents) absent a "persuasive showing" by the requesting party that release of the information is necessary. In this case, the Commission made the policy decision that release of the audit reports and the carriers' responses thereto satisfied the need of parties participating in the NOI. The Bureau's decision in the Letter Ruling overrides that policy direction in shameless fashion. The Letter Ruling must be reversed, and MCI's FOIA request must be denied.

Sincerely,

M. Robert Sutherland

[6] If the vendor chose not to agree to the release of its confidential information it would of course possess legal rights to prevent such release beyond those being exercised by BellSouth.

CERTIFICATE OF SERVICE

I, Margaret J. Herman, do hereby certify that copies of the foregoing were sent via first class mail, postage paid, to the following on this 3rd day of August, 1999:

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